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No. 03-444

Supreme Court, U.S.
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In The
Supreme Court of the United States

GERALD PALADINO and JAMES WRIGHT,

Petitioners,

v.

PHILADELPHIA HOUSING AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT PHILADELPHIA HOUSING AUTHORITY

PATRICK J. HARVEY, ESQUIRE
Counsel of Record
JOHN P. MCLAUGHLIN, ESQUIRE
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

Attorneys for Respondent Philadelphia Housing Authority

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit committed reversible error by ordering judgment as a matter of law to remedy an irreconcilable legal inconsistency in jury verdicts, where a new trial could have only resulted in further inconsistent verdicts or judgment in favor of the Philadelphia Housing Authority.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Seventh Amendment to the United States Constitution, the text of which is set out in the Petition for a Writ of Certiorari (the "Petition"), at 1, and Federal Rule of Civil Procedure 49 ("Rule 49"), the text of which is attached hereto as App., *infra*, 1-2.

STATEMENT OF THE CASE

The United States Court of Appeals for the Third Circuit (the "Third Circuit" or the "Court of Appeals") reversed the District Court's denial of the Philadelphia Housing Authority's (the "PHA") motion for judgment as a matter of law or, in the alternative, for a new trial, and granted judgment as a matter of law in favor of the PHA based on an irreconcilable inconsistency in the jury's verdicts. (Petition at 1a-5a). This case involved reverse discrimination claims by Petitioners Gerald Paladino and James Wright ("Petitioners") in the United States District Court for the Eastern District of Pennsylvania (the "Eastern District" or the "District Court"). Petitioners filed their Complaint against PHA and four current and former PHA employees – Charmaine Morton ("Morton"), Edward France ("France"), Frederick Purnell ("Purnell"), and George Fields ("Fields") (collectively, the "Individual Defendants"). The Petitioners alleged that the PHA discriminated against them based on their race (white), in promotion decisions made by the Individual Defendants. Their claims arose under Title VII of the Civil Rights Act

of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII").[1] (Petition at 2a). Petitioners also alleged that the Individual Defendants discriminated against them based on their race, in violation of 42 U.S.C. § 1981 ("Section 1981"), and aided and abetted the PHA in discriminating against them under the Pennsylvania Human Relations Act ("PHRA"). The Petitioners' allegations stemmed from a promotional process through which Petitioners were not awarded promotions.[2] (Petition at 2a-3a).

The jury ruled in favor of the Individual Defendants, finding that they neither discriminated against the Petitioners in violation of Section 1981, nor aided and abetted PHA in any discriminatory actions in violation of the PHRA.[3] Despite the jury's conclusion that the Individual Defendants did *not* discriminate, the jury inexplicably found that PHA did discriminate against the Petitioners in violation of Title VII and the PHRA. (Petition at 2a-3a). Both parties filed post-trial motions for judgment as a matter of law or a new trial, which the District Court denied. (Petition at 8a). PHA appealed the District Court's denial to the Third Circuit, alleging that the District Court erred in not granting PHA's post-trial motion based on,

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[1] The Petitioners sought relief on an identical claim against PHA under the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. § 951 *et seq.* (the "PHRA") and brought claims under 42 U.S.C. §§ 1981 and 1983 against all defendants. (Petition at 2a). The claims against PHA under 42 U.S.C. §§ 1981 and 1983 were dismissed on summary judgment. (Petition at 2a).

[2] Both Petitioners are, and at all stages of these proceedings have been, PHA employees. (App., *infra*, at 3-8).

[3] The district court dismissed Mr. Fields as a defendant during the trial.

inter alia, the jury's inconsistent verdicts.[4] (Petition at 3a). PHA argued that, since the jury exonerated the Individual Defendants, there was no basis to support a verdict against PHA. (Petition at 3a). Significantly, Petitioners did not appeal the denial of their post-trial motions, in which they claimed that the jury erred in ruling in favor of the Individual Defendants.

The Third Circuit conducted a thorough review of the District Court's record. (Petition at 1a-5a). After setting forth the facts on appeal, the Third Circuit held that PHA had not waived its objection to the inconsistent verdicts. (Petition at 3a). The court found that the District Court had properly instructed the jury with respect to the law. (Petition at 3a). The Third Circuit held that, consistent with the District Court's instructions, a "finding of intentional discrimination requires a finding that at least one person acting as PHA's agent had a discriminatory animus towards [Petitioners]." (Petition at 3a). Since the jury found that none of the Individual Defendants, who were the decision-makers, discriminated or aided and abetted any discriminatory conduct, the jury's verdict against PHA could not stand. (Petition at 3a-4a). The Third Circuit therefore reversed the verdict against PHA and ordered judgment in favor of PHA, citing this Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). (Petition at 4a).

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[4] As noted by the Third Circuit, PHA also appealed for "manifold" other reasons. The Third Circuit, however, did not address those other grounds for appeal. (Petition at 4a).

Moreover, the Third Circuit rejected the Petitioners' argument that PHA's loss of documents relating to the promotion process, and any "adverse inference" to be drawn from the loss, could serve to harmonize or explain the jury's inconsistent verdicts.[5] (Petition at 3a). The court held that "[e]ven if the jury drew the inference that the PHA willfully withheld incriminating documents . . . it would have had to infer that a *particular* agent of PHA was responsible for the discrimination against [Petitioners]." (Petition at 3a). The Third Circuit found that the "bulk of [Petitioners'] evidence pointed to France or Morton," and that, therefore, the jury could not have found that the other Individual Defendants "or any other minor actor in the drama, discriminated against [Petitioners]." (Petition at 3a).

Based on *Heller*, the Third Circuit reasoned that, if none of the individual agents of PHA discriminated against Petitioners, PHA could not be liable. The court ruled:

> If the jury concluded, as it did, that none of the three individual defendants had a wrongful intent, and no other PHA agent could plausibly be at fault, then the PHA cannot be liable.

(Petition at 4a). Basically, the jury found that the only PHA agents alleged to have – or who could have – discriminated on PHA's behalf had not discriminated against the Petitioners and did not have any discriminatory

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[5] The availability of such an adverse inference was one of the other issues that PHA raised on appeal that the Third Circuit did not address.

intent. Likewise, the jury found that the Individual Defendants did not "aid" or "abet" PHA's purported discrimination. The Third Circuit concluded as follows:

> The jury was correctly instructed on the law, *and its verdict finding that France, Morton, and Purnell did not discriminate against appellees and did not aid and abet the PHA in discriminating against appellees is entirely reasonable in light of the weakness of the evidence against them.* Moreover, its verdict regarding the individual defendants fatally undercuts the verdict finding the PHA liable. Therefore, the District Court erred in denying the PHA's post-trial motion for judgment as a matter of law or, in the alternative, for a new trial. Because the inconsistency of the jury's verdict requires us to reverse, we do not need to reach the manifold other issues raised by the PHA.

(Petition at 4a) (emphasis added).

The Third Circuit's opinion was based on this Court's holding in *Heller* and was tied closely to the evidence presented to the District Court and the trial judge's instructions to the jury. For those reasons, Petitioners' arguments regarding holdings of other circuit courts are inapplicable to this Court's decision as to whether to grant certiorari. Because the Third Circuit's decision complies with this Court's precedent and appropriately addresses the applicable facts and law, the PHA respectfully requests that this Court deny the Petition.

REASONS FOR DENYING THE WRIT

The law regarding appellate review of inconsistent jury verdicts is well settled. When faced with inconsistent verdicts, the Seventh Amendment to the United States Constitution generally requires circuit courts to attempt to reconcile those verdicts. *See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59 (1962). Where the court cannot reconcile the verdicts, the court generally will order a new trial on the claims leading to the inconsistent verdicts. *See Heno v. Sprint/United Management Co.*, 208 F.3d 847 (10th Cir. 2000); *Ladnier v. Murray*, 769 F.2d 195 (4th Cir. 1985); *Stephenson v. Doe*, 332 F.3d 68 (2d Cir. 2003). Where, however, the court is unable to order a new trial because only one of the inconsistent verdicts is before it on appeal, the court should vacate the verdict on appeal because vacating the verdict is the only way to resolve the inconsistency. *See De Feliciano v. De Jesus*, 873 F.2d 447 (1st Cir. 1989), *cert. denied*, 493 U.S. 850 (1989). In this case, the Third Circuit did exactly what was required under *Heller*, *De Feliciano*, *Heno*, and other relevant precedent.

I. THE COURT OF APPEALS RELIED ON THIS COURT'S PRECEDENT IN GRANTING JUDGMENT IN FAVOR OF PHA.

The Third Circuit's opinion relies on *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), in which this Court held that a jury's verdict in favor of an individual police officer on plaintiff's Section 1983 claim was conclusive as to the plaintiff's claims against the city and police commissioners. *Id.* at 799. The claims in *Heller* against the city were based on the alleged actions of the individual defendants. *Id.* at 797-99. The district court held a bifurcated trial, first

trying the plaintiff's claims against the officer. *Id.* at 797. After the jury returned a verdict in favor of the officer, the court dismissed the action against the city, "concluding that if the police officer had been exonerated by the jury there could be no basis for assertion of liability against the city." *Id.* at 798.

On appeal, the Ninth Circuit reversed the judgment in favor of the city, but did not disturb the judgment for the police officer. *Id.* Reviewing the Ninth Circuit's opinion, this Court found as follows:

> [N]either *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

Id. at 799. This Court reversed the Ninth Circuit's judgment. *Id.*

Similarly, in this case, the Third Circuit held that the jury could not have found that any employees other than the Individual Defendants could have been liable for discriminating against the Petitioners. (Petition at 3a-4a). The court further found that the verdict in favor of the Individual Defendants was "entirely reasonable in light of the weakness of the evidence against" the Individual Defendants. (Petition at 4a). Based on *Heller*, the jury's verdict exonerating the Individual Defendants, therefore,

"fatally undercuts the verdict finding the PHA liable." (Petition at 3a-4a).

II. THERE IS NO DISAGREEMENT AMONG THE COURTS OF APPEALS WITH RESPECT TO THE REMEDY TO BE APPLIED TO INCONSISTENT VERDICTS.

Petitioners' main argument appears to be that "[g]uidance is required from this Court to clarify the proper remedy in the face of inconsistent general verdicts." (Petition at 20-24). Contrary to Petitioners' assertions, the circuit courts have applied the same law to remedy inconsistent jury verdicts in civil rights cases.[6] As stated above, upon finding an irreconcilable inconsistency in jury verdicts, the court will either (a) order a new trial when both inconsistent verdicts are on appeal; or (b) order judgment as a matter of law where only one of the verdicts is appealed, and the other verdict has become "final and binding." *See De Feliciano v. De Jesus*, 873 F.2d 447 (1st Cir. 1989), *cert. denied*, 493 U.S. 850 (1989).[7]

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[6] Under Supreme Court Rule 10, this Court will grant a petition for a writ of certiorari "only for compelling reasons." One such reason is that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Supreme Court Rule 10(a). *See also Hubbard v. United States*, 514 U.S. 695, 720-21 (1995) (Rehnquist, C.J. dissenting).

[7] Petitioners cite early cases from the First Circuit that pre-date this Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). (Petition at 21). Contrary to Petitioners' argument, however, the First Circuit applied the same standard in all of the cases cited in the Petition. *See, e.g., Merchant v. Ruhle*, 740 F.2d 86 (1st Cir. 1984) (recognizing that a new trial was a potential remedy for inconsistent verdicts, but reconciling the verdicts regarding a shipowner's negligence and maintenance of

(Continued on following page)

In *De Feliciano*, the First Circuit addressed a situation almost identical to the situation in this case, and as the Third Circuit did in this case, the court ordered judgment as a matter of law for the defendant. *Id.* at 452. In *De Feliciano*, the jury returned inconsistent verdicts on plaintiffs' claims for discrimination based on their political affiliation. *Id.* at 448. The jury found in favor of the Farm Credit Corporation's ("FCC") president, sued individually as "the *only* person plaintiffs claimed to have [policymaking] authority," but the jury ruled against the FCC itself. *Id.* at 450.

The First Circuit reviewed the district court's decision to deny judgment as a matter of law or a new trial, and, as in this case, there was no appeal of the verdict in favor of the individual defendants. *Id.* at 452. The court held that the verdicts were inconsistent because no other employee of the FCC was alleged to have discriminated against the plaintiffs. *Id.* at 450-51. Based on that inconsistency, the Court held that it "must either (a) order a new trial, or (b) order judgment on the basis of the record in favor of the FCC." *Id.* at 451. The court held that judgment for the FCC was appropriate because, *inter alia*, the plaintiffs had not appealed the judgment on the verdict in favor of the

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an unseaworthy vessel because "the jury's efforts to apply the instructions were understandable"); *Cool Light Co. v. GTE Prods. Corp.*, 973 F.2d 31 (1st Cir. 1992), *cert. denied*, 507 U.S. 973 (1993) (recognizing the duty to attempt to reconcile inconsistent verdicts on contract claims, but ordering a new trial based on the irreconcilability of the verdicts). Like the Third Circuit in this case, in both *Merchant* and *Cool Light*, the court of appeals attempted to reconcile the inconsistency and recognized that it had the ability to order a new trial in the event that the verdicts were irreconcilable.

FCC's president, and the court, therefore, could not reverse that judgment. *Id.* at 452.

The *De Feliciano* court concluded, citing *Heller*, that "because the jury's finding that [the FCC's president] inflicted no constitutional harm has become *final and binding* upon the plaintiffs, we should follow the apparent weight of authority, and hold that the FCC is entitled to a judgment in its favor." *Id.* (emphasis added). *See also Batista v. Rodriguez*, 702 F.2d 393, 396-99 (2d Cir. 1983) (reaching the same basic conclusion as the court in *De Feliciano* – that, where the jury found a city liable on civil rights claims but exonerated the individual police officer defendants, judgment notwithstanding the verdict in favor of the city was the proper remedy for the inconsistent verdicts); *Heno v. Sprint/United Management Co.*, 208 F.3d 847 (10th Cir. 2000) (holding that verdicts in a discrimination case in favor of individual defendants but against the employer were irreconcilably inconsistent, but because *both the plaintiff and defendant appealed the inconsistent verdicts against them*, a new trial was the appropriate remedy); *Stephenson v. Doe*, 332 F.3d 68 (2d Cir. 2003) (remanding for a new trial where a verdict in favor of a police officer on qualified immunity was irreconcilably inconsistent with a verdict against the officer on an excessive force claim and both verdicts were on appeal); *Harris v. Niagara Mohawk Power Corp.*, 252 F.3d 592 (2d Cir. 2001) (finding that, where the circuit court could not reconcile factually conflicting retaliation verdicts against one defendant, and both verdicts were on appeal, the Seventh Amendment required the court to vacate the judgment and order a new trial); *Ladnier v. Murray*, 769 F.2d 195, 196-200 (4th Cir. 1985) (finding that a jury's verdict in favor of the plaintiff on his Section 1983 claim

was in conflict with the jury's verdict in favor of the defendant police officer on plaintiff's assault claim, and ordering a new trial because both the plaintiff and defendant appealed the judgment on the jury's verdicts); *Essex v. Prince George's County*, 17 Fed. Appx. 107 (4th Cir. 2001) (holding that the court had a duty to "harmonize inconsistent verdicts," but that where illegal arrest verdict was irreconcilably inconsistent with battery verdict, a new trial was appropriate).[8]

The Third Circuit in this case applied the same law that the *De Feliciano* Court applied and that other circuits

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[8] A review of decisions from the remaining circuit courts reveals that the Third Circuit in this case applied the same law that all circuit courts apply when facing inconsistent verdicts. *See, e.g., Mosley v. Wilson*, 102 F.3d 85 (3d Cir. 1996), (finding, in a suit alleging civil rights violations under Section 1983 and malicious prosecution under state law, and where both inconsistent verdicts were on appeal, that the court must attempt to resolve inconsistencies in jury verdicts; if it [can] not do so, a new trial is the appropriate remedy); *Mycogen Plant Sci., Inc. v. Monsanto Co.*, 243 F.3d 1316, 1325-26 (Fed. Cir. 2001) (citing *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 734 F.2d 133, 145 (3d Cir. 1984)) (applying the law of the Third Circuit, holding that "the courts have a duty to attempt to resolve potentially inconsistent verdicts" and that "[i]n the Third Circuit, an inconsistent verdict is grounds for ordering a new trial"); *International Data Prods. Corp. v. Dynamic Decisions Corp.*, No. 99-1686, 2000 U.S. App. LEXIS 9177 (4th Cir. May 9, 2000) (reconciling apparently inconsistent verdicts in a contract case); *Ellis v. Weasler Eng'g., Inc.*, 258 F.3d 326 (5th Cir. 2001) (reconciling verdicts in a products liability case); *Hopkins v. Coen*, 431 F.2d 1055 (6th Cir. 1970) (finding that the verdicts were irreconcilable and, therefore, ordering a new trial because the verdicts could not stand); *Moss v. Colorado Springs*, 871 F.2d 112 (10th Cir. 1989) (finding that verdicts in favor of individual police officers but against the city on plaintiffs' civil rights claims were inconsistent and remanding the case for a new trial).

have applied in similar cases.[9] The cases involve the same fundamental inconsistency: the jury's finding that the only Individual Defendants (who were the decision-makers) *did not* discriminate, but that the employer did discriminate. Petitioners failed to appeal the verdicts in favor of the Individual Defendants, so those verdicts are final. Had the Petitioners appealed the verdicts in favor of the Individual Defendants, the Third Circuit would have had the option of ordering a new trial. *See, e.g., Ladnier*, 769 F.2d at 196 (ordering a new trial on both plaintiff's § 1983 claim and his assault claim, where both of the verdicts had been appealed); *Heno*, 208 F.3d at 851-53 (ordering a new trial where *both the plaintiff and defendant appealed the verdicts against them*, and the circuit court concluded that those verdicts were inconsistent).

Instead, the Third Circuit was forced to remedy the irreconcilably inconsistent verdicts, where only one of

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[9] Petitioners' claim that the Third Circuit's Order violates the Seventh Amendment of the United States Constitution is flawed. (Petition at 13-14). The Seventh Amendment is the basis for the rule that courts attempt to reconcile jury verdicts. *See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59 (1962). Conversely, however, where the verdicts are irreconcilably inconsistent, the Seventh Amendment requires the court to vacate the judgment and order a new trial. *See Harris v. Niagara Mohawk Power Corp.*, 252 F.3d 592 (2d Cir. 2001).

In this case, the Third Circuit attempted to reconcile the jury's inconsistent verdicts but, finding that they were neither factually nor legally consistent, held that they could not stand. Since the Petitioners did not appeal the verdicts against the Individual Defendants, however, the Third Circuit could not order a new trial on the claims against them, and therefore properly granted judgment as a matter of law in PHA's favor. The result in this case is consistent with the result that this court reached in *Heller* and the First Circuit's decision in *De Feliciano*.

those verdicts was before the court. Based on *Heller*, *De Feliciano*, *Heno*, and the other cases cited above, the Third Circuit correctly decided that judgment in favor of PHA was appropriate. Petitioners are incorrect, therefore, in asserting that there is a split among the circuit courts regarding the remedy for inconsistent verdicts, and this court should deny the Petition for a Writ of Certiorari.

III. THE THIRD CIRCUIT CORRECTLY FOUND THAT THE VERDICTS IN THIS CASE WERE INCONSISTENT.

Petitioners argue that the Third Circuit could have reconciled the inconsistent verdicts. (Petition at 13-20). Contrary to their assertions, because Petitioners brought suit against PHA as well as all of the decision-makers, alleging the same set of facts against all Defendants, and the jury found that the decision-makers did not engage in any discrimination, there is no basis to harmonize the inconsistent verdicts. *See Heno v. Sprint/United Management Co.*, 208 F.3d 847 (10th Cir. 2000).

In *Heno*, *supra*, the jury found against the employer on plaintiff's Title VII claim, but found that the decision-makers did not discriminate based on race in their promotion decision. *Id.* at 851. The court concluded that those verdicts were inconsistent and found that the two individual defendants "were the only two Sprint agents who took part in conducting the promotion interview process." *Id.* at 853. With respect to the inconsistency between the verdict in favor of one of the individual defendants, Mr. Gary Crowder, and the verdict against Sprint, the court stated that "[t]he issue of Sprint's liability under Title VII is coextensive with Mr. Crowder's liability under § 1981. First, there is nothing to distinguish the Title VII and the

§ 1981 claims; they are based on the same facts." *Id.* The court continued as follows:

> [T]he jury instructions repeatedly stated that the jury could find that "Sprint and/or Gary Crowder intentionally discriminated" against [the plaintiff] . . . This instruction, however, was not meant to embrace every permutation regardless of the evidence. To be sure, the jury could be consistent if it found that both Sprint and Crowder were liable; that neither was liable; or that Crowder was liable for discriminating, but Sprint was not because Crowder acted outside the scope of his authority. However, the jury could not reconcilably find that Crowder did not discriminate but that Sprint did.

Id. The court concluded that the verdicts were inconsistent and ordered a new trial. *Id.* at 853, *see also De Feliciano v. De Jesus*, 873 F.2d 447 (1st Cir.), *cert. denied*, 493 U.S. 850 (1989) (holding that verdicts finding that a government entity discriminated against plaintiffs, but exonerating the "*only* person" alleged to have discriminated, were inconsistent, and ordering judgment in favor of the government entity).

In this case, the Third Circuit was faced with the same inconsistency as in *Heno* and *De Feliciano*: one verdict finding that a government entity discriminated against the plaintiffs, and the other verdict finding that the decision-makers did not discriminate. The Third Circuit attempted to reconcile the verdicts, but determined that the verdicts were irreconcilable, stating "[i]f the jury concluded, as it did, that none of the three individual defendants had a wrongful intent, and no other PHA agent could plausibly be at fault, then the PHA cannot be liable."

(Petition at 4a). The Third Circuit correctly found that the inconsistency in the jury's verdicts could not be reconciled.

IV. PETITIONERS' ARGUMENT THAT THE VERDICTS CAN BE HARMONIZED MERELY CHALLENGES THE THIRD CIRCUIT'S FACTUAL AND PROCEDURAL FINDINGS AND IS INCORRECT.

Petitioners argue that the Third Circuit erred in not harmonizing the verdicts based on three theories. (Petition at 13-20). Contrary to the Petitioners' assertions, the Court of Appeals addressed and correctly disposed of those arguments in its opinion.[10]

First, Petitioners argue that the Court of Appeals could have harmonized the verdicts by assuming that the jury believed that PHA employees other than the Individual Defendants discriminated against them. (Petition at 15-16). They argue that the "jury could have found, for instance, that there existed sufficient evidence that [Neil] Wortman . . . intentionally discriminated against [P]etitioners to hold PHA liable." (Petition at 16). The Court of Appeals addressed this issue, holding that "[s]ince the bulk of [Petitioners'] evidence pointed to France or Morton, who were found to be not liable, the jury could not have found that sufficient evidence existed that Neil

[10] As noted above, the PHA presented several issues, in addition to the inconsistent verdicts, to the Third Circuit. Those issues included the impropriety of the district court's "adverse inference" instruction. The Third Circuit did not address those issues, and in fact stated, "[b]ecause the inconsistency of the jury's verdict requires us to reverse, we do not need to reach the manifold other issues raised by PHA." (Petition at 4a).

Wortman . . . or any other minor actor in the drama, discriminated against [Petitioners]." (Petition at 3a). The court also emphasized and relied on the "weakness of the evidence" presented by the Petitioners regarding discriminatory conduct. (Petition at 4a). Furthermore, Petitioners never suggested such an argument either before or during the trial. It was only after this appeal was filed, when the inconsistency of the jury's verdicts was highlighted, that the Petitioners offered Wortman – who was not named as a defendant – as a possible discriminator. In fact, during the trial, Petitioners' counsel argued that Wortman was *not* a decision-maker in the promotion process. (App., *infra*, at 9-12).

Second, the Third Circuit dealt specifically with the "adverse inference" argument, holding that "[e]ven if the jury drew the inference that the PHA willfully withheld incriminating documents . . . it would have had to infer that a *particular* agent of PHA was responsible for the discrimination against appellees." (Petition at 3a). Because the jury held that no PHA employee alleged to have discriminated against the Petitioners actually discriminated against the Petitioners, the adverse inference cannot justify the inconsistency in the verdicts and cannot support the verdict against PHA.

Finally, the Petitioners' "collective action" argument is futile. (Petition at 18-20). The District Court's jury instructions with respect to the Individual Defendants dealt with aiding and abetting liability under the Pennsylvania Human Relations Act. (App., *infra*, at 12-14). The jury was instructed that the "essential element of aiding and abetting liability is the sharing of wrongful intent with a principal." (App., *infra*, at 13-14). Logically, the Individual

Defendants could not have engaged in collective discriminatory action or shared in PHA's purported discriminatory intent without having any discriminatory intent themselves. By finding that the Individual Defendants did not aid and abet PHA in discriminating, they essentially found that the Individual Defendants did not engage in collective discriminatory action.

V. PHA DID NOT WAIVE ITS OBJECTION TO THE INCONSISTENCY IN THE VERDICTS.

Because the jury's verdicts in this case were special verdicts, the Third Circuit correctly held that, despite Petitioners' "suggestion to the contrary, the PHA did not waive the inconsistent verdicts issue." (Petition at 3a). Federal Rule of Civil Procedure 49(a) ("Rule 49(a)"), dealing with special verdicts, does not provide for waiver of a party's objection to inconsistencies between special verdicts. Fed. R. Civ. P. 49(a).[11] The law in this area is clear, and the Third Circuit merely applied that law.

Several circuit courts have held that, although a party may not have objected to an inconsistency in jury verdicts before dismissal of the jury, that party has not waived its objection to that inconsistency. For example, in *Heno v. Sprint/United Management Co.*, 208 F.3d 847 (10th Cir. 2000), the court reviewed jury verdict forms on which the jury answered "yes" in response to the question whether the plaintiff had "proven that Plaintiff's race was . . . a motivating factor in the decision of Sprint not to promote

[11] The full text of Fed. R. Civ. P. 49 is attached hereto, App., *infra*, at 1-2.

the Plaintiff," but answered "no" to the same question with respect to the individual supervisor responsible for the promotion decision. *Id.* at 851.

The *Heno* court held that, because the verdicts were special verdicts under Rule 49(a), Sprint had not waived its objection to their inconsistency by not objecting to the inconsistency before the court dismissed the jury. *Id.* Ultimately, the court held that the verdicts were inconsistent and ordered a new trial on plaintiff's claims. *Id.* at 853; *see also Malley-Duff & Associates, Inc. v. Crown Life Insurance Co.*, 734 F.2d 133, 144-45 (3d Cir. 1984) (finding that verdicts similar to those in this case were Rule 49(a) special verdicts and that the appellant had not waived its objection to their inconsistency by not objecting to them before the jury was discharged); *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1056-57 (3d Cir. 1991) (holding that no waiver occurs if the jury renders special verdicts under Rule 49(a)); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993) (discussing waiver generally and stating that "when the verdicts are special verdicts a party is not required to object to the inconsistency before the jury is discharged in order to preserve that issue for a subsequent motion before the district court"); *Pierce v. Southern Pacific Transp. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987) (stating that special verdicts "are governed by Rule 49(a), which does not require objections before discharge of the jury").

In this case, the jury decided each Defendant's liability individually under each of the Petitioners' theories, and then determined the amount due to the Petitioners, if any, under each of Petitioners' theories. (Petition at 15a-18a). The District Court did not ask the jury to return a general verdict along with responses to "written interrogatories

concerning the factual determinations upon which the verdict rests."

Rather, based on the cases above, the verdicts in this case were "in the form of written responses to separate questions concerning the factual issues in dispute." The verdicts, therefore, are Rule 49(a) special verdicts. PHA objected to the inconsistency in the verdicts in its post-trial motion, which the District Court denied. (Petition at 2a-3a). PHA then appealed that denial to the Court of Appeals. Accordingly, PHA has not waived its objections to the inconsistent jury verdicts in this case.

CONCLUSION

Pursuant to the arguments set forth above, Respondent Philadelphia Housing Authority respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Date: November 24, 2003

PATRICK J. HARVEY
JOHN P. MCLAUGHLIN
BALLARD SPAHR ANDREWS &
INGERSOLL, LLP
1735 Market Street,
51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

Counsel for Respondent
Philadelphia Housing
Authority

FEDERAL RULES OF CIVIL PROCEDURE
VI. TRIALS

Rule 49. Special Verdicts and Interrogatories

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the

answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

GERALD PALADINO **26 Country Lane** **Philadelphia, PA 19115** **and** **JAMES WRIGHT** **7201 Shalkop Street** **Philadelphia, PA 19126** **v.** **PHILADELPHIA HOUSING AUTHORITY** **2012 Chestnut Street** **Philadelphia, PA 19103** **and** **FREDERICK S. PURNELL, Individually and In His Official Capacity** **2012 Chestnut Street** **Philadelphia, PA 19103** **and** **GEORGE FIELDS, Individually and In His Official Capacity** **2012 Chestnut Street** **Philadelphia, PA 19103** **and** **CHARMAINE MORTON, Individually and In Her Official Capacity** **2012 Chestnut Street** **Philadelphia, PA 19103** **and**	:	**Civil Action** **NO. 99CV-6424**

EDWARD A. FRANCE, JR., Individually and In His Official Capacity
2012 Chestnut Street
Philadelphia, PA 19103
and
JOHN DOE, Individually and In His Official Capacity
2012 Chestnut Street
Philadelphia, PA 19103
and
JANE DOE, Individually and In Her Official Capacity
2012 Chestnut Street
Philadelphia, PA 19103

COMPLAINT
JURISDICTION AND VENUE

1. This is a civil action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, as amended 1991; the Civil Rights Act of 1866, 42 U.S.C. §1981; Civil Rights Act of 1871, 42 U.S.C. §1983; and the Pennsylvania Human Relations Act ("PHRA"), *et seq.*, as amended 1991. The amount in controversy exclusive of interest and costs exceeds $150,000.00. Jurisdiction is based upon 28 U.S.C. §§1331 and 1343(1)(3)(4) and the aforementioned statutory provisions. Pendent state law claims asserted are before this Court pursuant to 28 U.S.C. §1367(a), supplemental jurisdiction. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(1) and (2).

2. Plaintiff Gerald J. Paladino has exhausted federal and state administrative remedies. On April 8, 1998, Plaintiff Gerald J. Paladino filed a claim with the

Pennsylvania Human Relations Commission ("PHRC") at PHRC Docket No. E87175D which was dual filed with the Equal Employment Opportunity Commission ("EEOC") at EEOC Charge No. 17F982288. On December 6, 1999, the United States Department of Justice, Civil Rights Division, issued a Right-to-Sue letter. This suit is timely filed within ninety (90) days of issuance of said letter.

3. Plaintiff James Wright has exhausted federal and state administrative remedies. On April 8, 1998, Plaintiff James Wright filed a claim with the Pennsylvania Human Relations Commission ("PHRC") at PHRC Docket No. E87174D which was dual filed with the Equal Employment Opportunity Commission ("EEOC") at EEOC Charge No. 17F982287. On December 6, 1999, the United States Department of Justice, Civil Rights Division, issued a Right-to-Sue letter. This suit is timely filed within ninety (90) days of issuance of said letter.

PARTIES

4. Plaintiffs Gerald J. Paladino ("Paladino") and James Wright ("Wright") are adult white males residing in Philadelphia, Pennsylvania.

5. Defendant Philadelphia Housing Authority ("PHA") is an agency of the Commonwealth of Pennsylvania which owns, operates, manages, directs and controls both scattered site and conventional public housing sites in the City of Philadelphia. At all times relevant to this action, PHA was the employer of Paladino and Wright and of defendants Frederick S. Purnell, George Fields, Charmaine Morton, Edward A. France, Jr., John Doe and Jane Doe.

6. Defendant Frederick S. Purnell ("Purnell") is a black male who was at all times relevant to this action the Associate Executive Director of Modernization for PHA. He is being sued in both his individual and official capacities.

7. Defendant George Fields ("Fields") is a black male who was at all times relevant to this action a Housing Rehabilitation Specialist and/or a Housing Rehabilitation Supervisor in the PHA's Modernization Department. He is being sued in both his individual and official capacities.

8. Defendant Charmaine Morton ("Morton") is a black female who was at all

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

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PALANDINO, et al.	:	CIVIL ACTION NO.
Plaintiff	:	99-6424
	:	
v.	:	Philadelphia, Pennsylvania
PHA, et al.	:	June 1, 2001
Defendant	:	

CIVIL JURY TRIAL
BEFORE THE HONORABLE EDUARDO C. ROBRENO
UNITED STATES DISTRICT COURT JUDGE

* * *

[113] Q And how did you obtain those skills?

A Through the family. My family is tradesman of electricians, plumbers, carpenters – my father is a carpenter – plasterer, my uncle is a tilesetter, bricklayer. My other uncles are two electricians. I have plumbers back before the code was even written, my grandfather was a plumber.

Q Do you, yourself, have any certificates in any of those trades?

A I'm a licensed electrician in the City of Philadelphia.

Q And how do you get –how do you become a licensed electrician?

A You must take a test.

Q Did you take that test and pass?

A Yes, I did.

Q And when was that?

A That was somewhere between '73 and '74.

Q Now, at the present time you're employed at the Philadelphia Housing Authority, is that correct?

A That's correct.

Q Before you came to the Housing Authority, where did you work?

A Before?

Q And if you could go, very brief, in chronological order.

A I mean, I worked during high school in the summers, but I

* * *

[119] Q How many other supervisors were there in the department at that time?

A None. There was a construction manager.

Q And who was the construction manager?

A Nick DiPiero.

Q Now, the hierarchy, you were in the modernization department back in '97, right?

A That's correct.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

PALADINO, et al, Plaintiffs	: CIVIL ACTION : NO. 99-6424
v.	: Philadelphia, Pennsylvania : June 8, 2001
PHILADELPHIA HOUSING AUTHORITY, et al, Defendants	: 10:00 o'clock a.m.

JURY TRIAL
BEFORE THE HONORABLE EDUARDO C. ROBRENO
UNITED STATES DISTRICT COURT JUDGE

* * *

Mr. Gruenstein

[54] round. And no great surprise, but Mr. Fields just happens to be in the top five.

Keep in mind this is at a time when Mr. Wright and Mr. Paladino both fairly compete in this second process and don't come out in the top five, and this is also after Mr. right had called Mr. France to say, What's going on? This job – I already have this job. And Mr. France just laughed at him.

So that's what's going on here. So Mr. France controls this process and he selects the top five, and we don't know what their scores were because there are no documents that would support the rankings that Mr. France came up with.

Now, the next thing that happens is there's now going to be the final selection. Mr. Wortman is going to do it and

Mr. Marra. Ask yourself, if Mr. Marra is such a terrible person, and if he's a discriminator, if he is just a person who just does bad things, why would they still have him on the next panel that's going to be selecting the people?

In any event, now they have this second panel and Mr. Wortman tells you about how they interview all five people and Mr. Wortman makes the decision to pick the people who win.

Now, that's really not true and we know it's not [55] true because Mr. France picked the winners. And we know he picked the winners because on January the 7th, Mr. France wrote a memo and he put Fields, Nunes, DeGravio. And he put a square around it. Gets the job. 1/7/98. And then he signs it or he puts his initials, Ed France.

Now, Mr. France tells you that, Oh, that was just a bet that I made with Mr. Kosniuk about who was going to get the job. Well, ask yourself a few questions. Mr. France is a human resources professional. Mr. France is involved in a process that, according to him, had to be implemented because of claims of unfairness. And knowing how sensitive this whole second process is supposed to be, does it make – does it offend your common sense that a human resources professional would make a bet? Would be so cavalier as to make a bet with somebody else about who's going to get the job?

And also keep in mind this is an explanation that Mr. France came up with two months after his deposition was taken and only after he talked to his lawyers. And I suggest to you that Mr. France had to come up with this explanation, because he knows quite well that that piece of evidence is a damning piece of evidence to Mr. France. But

he tells you that's not the case. He's a professional and he would never do anything like that.

And we also know that Mr. Wortman, when he says he [56] does the process, now somewhere it turns out that there's a tie between Mr. Silberman and Mr. Fields. So what does Mr. Wortman do? But he goes back again to Mr. France, and Mr. France says, Well, why don't you just use seniority? Ask yourself a question. As the head of Human Resources, would Mr. France have access to the personnel records? Would he be able to know who has more seniority; Silberman or Fields?

But even more importantly, remember when I went through with Mr. Wortman about what he was looking for in terms of who was going to do this job? And was he looking for somebody who would be a good supervisor who had the skills?

And remember Mr. Wortman told you all about that memo. And the defendants put it in evidence, I think it's Defendants' No. 8, and Mr. Wortman told you, I wrote this memo because I wanted to document everything that I had done, so that there would be a record.

Well, when you look at Mr. Wortman's record, the only person who got an unacceptable response for the one key question, What do you need to be a good supervisor? The only person who got that unacceptable response was Mr. Fields. And when I asked Mr. Wortman, Was that equitable to give the job to Mr. Fields when he got an unacceptable response to being a good supervisor, what it takes, Mr. Wortman had no response. And the reason he had no response is because Mr. [57] Wortman knew that the winner, Mr. Fields, had been preselected by Mr. France.

Now, I submit, ladies and gentlemen, that the race of my client and the race of Mr. Paladino played a role in the decision that was made to deprive them of the job that they had fairly and honestly won. It may not be the sole reason, but it was certainly a reason. It was a certainly a factor that was considered and was determinative in this case.

Now, and I would submit that when you look at this evidence, and you make that conclusion, then you know from the evidence that these two men were the victims of discrimination. They were the victims.

There were violations of the laws that are supposed to protect all of us, regardless of our color, regardless of our sexual orientation, regardless of our gender. They're supposed to protect everybody. And they didn't in this case because they were used to hurt Mr. Paladino and Mr. Wright.

Now, you heard Mr. Bunin talk about the damages in this case. And you heard Mr. Bunin tell you that Mr. Wright has sustained economic damages. He sustained past lost earnings of about $13,000. The present value of his future lost earning is about $156,000. His pension benefits, the present value of that is around $20,000. His pension contributions. Another kind of pension contributions about

* * *

[143] Charge of the Court

namely, that any of the promotions ultimately went to a white person.

Now, let me return to aiding and abetting, because that involves the individual defendants only under the Pennsylvania Human Relations Act. And you may remember that earlier I told you that the Pennsylvania Human Relations Act only applies to the Philadelphia Housing Authority.

Aiding and abetting, however, under the Pennsylvania Human Relations Act only applies to the individual defendants.

The relevant section of the statute makes it a violation of the Pennsylvania Human Relations Act to quote:

"For any person, employer, or employment agency, labor organization or employee to aid, abet, insight, compel or coerce the doing of any act declared by the section to be an unlawful discriminatory practice or to obstruct or prevent any person from complying with the provisions of this act, or any other issue thereon, or to attend directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice."

End of quote.

The essential element of aiding and abetting liability is the sharing of wrongful intent with a principal. In this case the principal is the Philadelphia Housing Authority.

[144] Charge of the Court

Thus, if you find that the Philadelphia Housing Authority intentionally discriminated against plaintiffs on the basis of race, and that Mr. France, Miss Morton, and/or Mr. Purnell was an active partner with the Philadelphia Housing Authority and shared with the Philadelphia

Housing Authority the intent to intentionally discriminate against plaintiffs, then you must find that the defendants are liable for aiding and abetting and intentionally discriminated against plaintiffs.

Now, that completes my discussion on liability and I'm now going to turn to damages. Simply because I am going to talk to you about damages, does not mean that I believe that any damages are warranted, or that I am suggesting that you should consider it. That's entirely up to you. I have no views on that matter one way or the other, but I must discuss damages in this case.

If you should find that any or all of the defendants discriminated against he plaintiffs based on their race, then you must determine an amount that is fair compensation for the plaintiffs' damages. You may award compensatory damages only for injuries that plaintiffs proved were caused by the defendants wrongful conduct. The damages that you award must be fair compensation; no more or no less.

Now, if you return a-verdict for plaintiffs, but find that they failed to prove by the preponderance of the

* * *